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Supreme Court of the United States.

October Term, 1968.

No.

COMMONWEALTH OF MASSACHUSETTS,
Appellee,
v.
NICK M. EGLESON,
Appellant.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT.

Appellant Nick M. Egleson appeals from the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered on January 30, 1969, overruling the exceptions of the appellant to his conviction of the crime of trespass which is defined in Massachusetts General Laws (Ter. Ed.) c. 266, § 120. Appellant submits this Statement to show that this Court has jurisdiction of the appeal and that a substantial federal question is presented.

Opinion Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported in Mass. Adv. Sh.

(1969) 175. A certified copy of said opinion is included in the Record supplied by the Clerk of the Supreme Judicial Court for the Commonwealth of Massachusetts and has been reprinted and appears as Appendix A to this Statement.

Jurisdiction.

This is a criminal prosecution brought originally in the Roxbury District Court where the appellant was convicted of the crime of trespass pursuant to Massachusetts G.L. (Ter. Ed.) c. 266, § 120. Appellant was subsequently convicted again at a trial *de novo* held before the Superior Court for the Transaction of Criminal Business, Suffolk County, sitting without a jury. The conviction by the Superior Court was sustained by the Supreme Judicial Court for the Commonwealth, the court of last resort in Massachusetts, and the judgment became final under Massachusetts law and for the purpose of invoking this Court's jurisdiction, on January 30, 1969. Appellant seasonably filed notice of appeal on April 22, 1969. Appellant raised at all stages of the proceedings his claim that Massachusetts G.L. (Ter. Ed.) c. 266, § 120, as applied against him in the circumstances of this case, is repugnant to the First and Fourteenth Amendments to the Constitution of the United States. (See page 4 of document numbered 1, the certified copy of the Record before the Supreme Judicial Court.)* Both the Superior Court and the Supreme Judicial Court considered and rejected this contention.

The jurisdiction of this Court to review that decision and judgment of the Supreme Judicial Court by direct ap-

*Hereinafter document 1 will be referred to as "R"; other documents will be referred to by their numbers, e.g., "document 2."

peal is conferred by Title 28, United States Code, Section 1257(2), and is supported by the following decisions:

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U.S. 282 (the state statute need not be declared valid *in toto*, but need only be declared valid in the circumstances of the particular case at hand, in order for the appellant attacking the application of the statute as repugnant to the Constitution to have a right of direct appeal).

Guaranty Trust Co. v. *Blodgett*, 287 U.S. 509, 513, and *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U.S. 684, 688 (where the validity of the state statute has been sustained in the face of federal objections, the Supreme Court on appeal must accept the state court's construction of the statute and proceed to test the validity on that basis).

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts in this case is a "final judgment," is not subject to further review or correction in any other state tribunal and must be considered to be "the final word of a final court." *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. 548, 551. Appellant has been sentenced, and the overruling of exceptions to that sentence was the final judgment in this case. *Berman* v. *United States*, 302 U.S. 211; *Parr* v. *United States*, 351 U.S. 513, 518. See documents 2 and 3 which are certified copies, respectively, of the order of the Supreme Judicial Court and of the entry of that order in the case docket.

Question Presented.

Should a conviction for violation of a state criminal trespass statute be upheld in the face of attack under the Free

Speech guaranty of the First and Fourteenth Amendments to the Constitution of the United States where the trespasser, a draft counsellor, is convicted for remaining in a municipal building for the purpose of speaking to a few young men who report to their local Selective Service Board on the fourth floor of said building and wait inside for one-half hour or longer until a bus arrives to transport them to the pre-induction physical examination station?

Constitutional Provisions Involved.

United States Constitution, Amendment I: "Congress shall make no law . . . abridging the freedom of speech . . ."

United States Constitution, Amendment XIV: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Statutes Involved.

Massachusetts G.L. (Ter. Ed.) c. 266, § 120: "Whoever, without right, enters or remains in or upon the dwelling house, buildings, boats or improved or enclosed land, wharf or pier of another, after having been forbidden so to do by the person who has the lawful control of said premises, either directly or by notice posted thereon, shall be punished by a fine of not more than twenty dollars. A person who is found committing such trespass may be arrested by a sheriff, deputy sheriff, constable or police officer and kept in custody in a convenient place, not more than twenty-four hours, Sunday excepted, until a complaint can be made against him for the offence, and he be taken upon a warrant issued upon such complaint."

Statement of the Case.

The appellant, Nick M. Egleson, appeals his conviction for violating G.L. (Ter. Ed.) c. 266, § 120, which defines the misdemeanor of trespass. The case was initially tried before the District Court for the Roxbury District. Upon his conviction in that court, the appellant demanded and received a trial *de novo* before the Superior Court for the Transaction of Criminal Business, a court of record, to which appellant was entitled as a matter of right under Massachusetts practice. G.L. c. 278, § 18. In the Superior Court, the appellant seasonably filed a motion for verdict of acquittal on two occasions—once at the conclusion of the Commonwealth's evidence (R. 1), and thereafter at the conclusion of all of the evidence (R. 1). The motions each raised the First and Fourteenth Amendments as grounds for declaring the trespass statute involved unconstitutional as applied to the facts of this particular case: ". . . as applied in the present case, G.L. (Ter. Ed.) C. 266, §120 deprives defendant of his right of free speech in violation of the provisions of the First and Fourteenth Amendments to the Constitution of the United States . . ." (R. 4). The motions were denied both times by the Superior Court.

Thereafter, appellant filed timely notice of appeal to the Supreme Judicial Court for the Commonwealth of Massachusetts, the Commonwealth's court of last resort. The federal question—i.e., whether or not the statute was unconstitutional in the circumstances—was raised before the Supreme Judicial Court by a bill of exceptions (G.L. c. 278, § 31). Because of the nature of a bill of exceptions under Massachusetts practice, the factual statement of the case contained in such bill presents to the Court the uncontested facts and issues of the case. The evidence was uncontradicted. (Opinion of the Supreme Judicial Court, Appendix A, attached hereto.) The Supreme Judicial

Court, while clearly and squarely recognizing the presence of a substantial federal question, purported to weigh the circumstances and uphold the statute and the conviction against constitutional attack.

> "The city had both a right and a duty to protect the building and its functions against any self-proclaimed need for an individual entry which could not, so far as appears, benefit the public use in any respect. 'The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.' *Adderley* v. *Florida,* 385 U.S. 39, 47. 'The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.' *Cox* v. *Louisiana,* 379 U. S. 536, 554. See *Cox* v. *Louisiana,* 379 U. S. 559, 563; *Cameron* v. *Johnson,* 390 U. S. 611, 616-617; *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.* 391 U. S. 308, 320." (Opinion of the Supreme Judicial Court, last paragraph, Appendix A, *infra.*)

The question involved is a "substantial federal question" not only in the sense that it involves a clear question governed by federal law, but also because the federal question involved is one of major importance, involving as it does an alleged infringement of "the preferred amendment" in circumstances where freedom of speech becomes far more than a formal exercise. The facts here involve a situation

where both the speaker (appellant herein) and the would-be-listeners have an immediate and direct interest in allowing free speech to go unfettered.

The uncontradicted facts indicate that Egleson, the appellant, a college graduate and instructor in humanities at the Massachusetts Institute of Technology, worked with the so-called Boston Draft Resistance Group, a group dedicated to the dissemination of information to persons affected by the selective service laws who may not have a sufficient knowledge of those laws.

On April 2, 1968, Egleson went to a municipal building at 20 South Street, Jamaica Plain, Massachusetts, to talk with pre-inductees who had been notified to report to the Jamaica Plain "Draft Board," Local Board No. 151, on the fourth floor of said Building (hereinafter referred to as the "Building") (R. 2-3). In addition to the fourth floor offices of the draft board, the Building contains a gymnasium with four basketball courts on the third floor, a dental clinic, a baby clinic, a civil defense office on the fourth floor, a running track on the fourth floor, a locker room with 96 lockers on the second floor, a swimming pool in the basement, an office of the Visiting Nurse's Association and the custodian's office on the ground floor, two separate staircases leading from the ground floor to the fourth floor, and numerous bulletin boards setting forth information of public interest (R. 2).

Each month, a group of pre-inductees, like the group of April 2, are notified to report to the draft board by 7:00 a.m., and after reporting they are directed to board a bus which takes them to the Boston Army Base for their pre-induction physical examinations (R. 3).

Egleson entered the Building at about 6:25 a.m., on April 2, and by 6:45 a.m. approximately 20 pre-inductees had arrived. These pre-inductees were standing about,

mostly on the fourth floor with some on the third floor and some on the landing between the two floors where Egleson was arrested (R. 3-4).

Egleson entered the Building to talk with pre-inductees about their statutory and constitutional rights and he was so engaged at the time he was arrested (R. 3). In talking with pre-inductees, Egleson identified himself and his association with the Boston Draft Resistance Group, stated his opposition to the Vietnam conflict and offered to inform pre-inductees of their rights. Egleson did not force conversation upon anyone who did not wish to talk with him (R. 3). Egleson did not and would not counsel anyone to perform an illegal act (R. 3-4). As an example of the pre-inductees' need for information, Egleson related that one of the pre-inductees with whom he spoke erroneously believed himself exempt from compulsory military service by reason of his being Puerto Rican (R. 4).

It would not have been possible for Egleson to speak with the pre-inductees outside the Building (R. 4): Egleson's prior experience in draft counselling at a local draft board had taught him that pre-inductees when approaching the Building are in a hurry to report before the 7:00 a.m. deadline and they do not stop outside the Building to talk. Yet once they report to the Board on the fourth floor, they wait idle there for a period of one-half hour or more, that is, until approximately 7:30 a.m., before they depart by bus for the medical examination station, and it was during this period of time that Egleson sought to speak with the pre-inductees (R. 4).

The custodian of the Building, Mr. Slowe, knew that Egleson wanted only to talk with pre-inductees about their rights. While he told Egleson to leave the Building because he had to clean the Building and because only cleaning personnel and persons having business with the draft

board were normally admitted at that hour, the custodian did not ask Egleson to go to the fourth floor and remain with the pre-inductees (R. 3). Had he done so, Egleson would have acquiesced (R. 4). Egleson thought he was not interfering with the cleaning of the Building—he did not see the custodian trying to clean the area of the third and fourth floors or the stairway or landing between them, where he was arrested, and he was more than willing to move away from any area being cleaned (R. 4). Indeed, Egleson left the Building when the custodian originally asked him to do so (R. 3-4). Egleson re-entered the Building, accompanying a pre-inductee, whereupon the custodian called the police who found Egleson talking with some pre-inductees on the landing between the third and fourth floors and arrested him (R. 3).

Furthermore, there was no evidence that Egleson in any way interfered with the processing of the pre-inductees. Egleson did not intend to create a disturbance or otherwise interfere with the use or maintenance of the Building and had such interference been created by his presence, he would have left the Building (R. 4).

The Commonwealth did not dispute any of the above facts, which were found by the trier of fact, the Superior Court judge.*

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*Indeed, in the brief filed by the Commonwealth in the Supreme Judicial Court, the Commonwealth conceded that there "... was no evidence that the defendant was conducting his conversations other than in a peaceful manner (R. 4)." (Page 3 of that Brief.) The Commonwealth also admitted that there "... was nothing in the content of his words which could render it unprivileged under First Amendment guaranties." (Page 9 of that Brief.) And as for any interference with the activities taking place or about to take place in the Building, the Commonwealth conceded, "There is little doubt that such interference was, in all respects, less than significant, and certainly it will not be argued in this brief that such interference was sufficient to render any conduct unprotected." (Page 13 of that Brief.)

The Supreme Judicial Court, while it did not and could not make factual findings contrary to those of the Superior Court, nevertheless chose to ignore or de-emphasize some of the facts. For example, there was no evidence, and certainly no finding, of any disruption caused in the Building by virtue of the presence of the appellant, but the Supreme Judicial Court *hypothesized* that if appellant were allowed to enter the Building, then "an indefinite number of others could . . . enter . . ." (Opinion, Appendix A, *infra,* at page 20). The court further theorized that "The defendant's purpose . . . probably would be a deterrent, to the efficient work of the Draft Board" (Opinion, Appendix A, *infra,* at page 20), despite the absence of any evidence or any finding of fact to this effect. The *fact* is, and the circumstances of this case are such, that *no* disruption occurred, an "indefinite" or even large number of non-pre-inductees did *not* enter the Building, the operations of the superintendent and of the Local Board were not hampered to any perceptible or significant extent, Egleson was anxious to avoid any unnecessary interference, and he conducted himself at all times in such a manner as to minimize whatever friction inevitably resulted from the custodian's adamant and arbitrary posture.

The Question Presented is Substantial.

This case presents a substantial federal question. It is related to the cases of *Wolin* v. *Port of New York Authority,* 392 F. 2d 83 (1968), cert. den. November, 1968; and *In re Hoffman,* 434 P. 2d 353, 64 Cal. Rptr. 97 (1967), where the Court of Appeals for the Second Circuit and the Supreme Court of California reversed criminal trespass convictions against individuals who had distributed anti-war literature in a bus terminal and in a railroad station, respectively.

Time and again, this Court has rejected blanket prohibitions against the exercise of First Amendment rights, setting aside convictions for trespass, for breach of the peace, for loitering, for contempt of court, and upholding the exercise of such rights in all kinds of places: in a shopping center—*Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); in a one-room branch library—*Brown* v. *Louisiana*, 383 U.S. 131 (1966); in a drug store—*Bouie* v. *Columbia*, 378 U.S. 347 (1964); in front of a city hall—*Henry* v. *Rock Hill*, 376 U.S. 776 (1964); in a public park—*Wright* v. *Georgia*, 373 U.S. 284 (1963); on state house grounds—*Edwards* v. *South Carolina*, 372 U.S. 229 (1963); in a bus depot—*Taylor* v. *Louisiana*, 370 U.S. 154 (1962); in a department store—*Garner* v. *Louisiana*, 368 U.S. 157 (1961); in an auditorium in a private building—*Terminiello* v. *Chicago*, 337 U.S. 1 (1949); in the vicinity of a court house—*Cox* v. *Louisiana*, 379 U.S. 536 (1965); and even in a courtroom—*Johnson* v. *Virginia*, 373 U.S. 61 (1963).

In these and other decisions, this Court has clearly articulated the preferred status of the free speech guaranty, occasionally by applying the so-called "clear and present danger" test, and on other occasions by balancing the individual's weighty right to speak against the need to limit the exercise of that right in order to protect the rights of others—in the latter cases, only a demonstrably compelling state interest can be allowed to tip the balance against protection of the individual's right to speak. The critical circumstance here, which entitles appellant to prevail on either standard, is that the degree of interference was minimal. As this Court took pains to emphasize in *Brown* v. *Louisiana, supra*, at page 142, ". . . no claim can be made that use of the library by others was disturbed by the demonstration."

Appellant does not claim an absolute right to speak in any manner and in all circumstances. He agrees, for instance, that a singing demonstration intended to disrupt a city council meeting is not protected. *State* v. *McNair*, 178 Neb. 763 (1965). On the other hand, some element of interference may be inevitable and tolerable: in *Amalgamated Food Employees* v. *Logan Valley Plaza, supra*, picketing in the pick-up and delivery area of a supermarket was held to be protected. (Had the case involved picketing *inside* the supermarket, it seems probable that this Court would have reached the opposite conclusion, but some other mode of speech might have been sanctioned, e.g., leafletting, despite the crowded conditions prevailing inside supermarkets.) Thus, one mode of speech may be protected while another mode of speech may pass the boundaries of protection because of the extent of interference with other legitimate activities: in *Farmer* v. *Moses*, 232 F. Supp. 154 (1964), leafletting at the New York World's Fair was permitted but picketing prohibited. The principle on which appellant relies was well expressed in *In re Hoffman, supra:*

> "The primary uses of municipal property can be amply protected by ordinances that prohibit activities that interfere with those uses. Similarly, the primary uses of railway stations can be amply protected by ordinances prohibiting activities that interfere with those uses. In neither case can First Amendment activities be prohibited solely because the property involved is not maintained primarily as a forum for such activities." 434 P. 2d at 356.

Appellant diligently pressed all of these contentions below, suggesting particularly that the present case is not

reasonably distinguishable from the decisions of this Court in *Brown* v. *Louisiana, supra,* and *Amalgamated Food Employees* v. *Logan Valley Plaza, supra,* among others.

The Supreme Judicial Court apparently considered these decisions as representing ephemeral views, ". . . often expressed by a divided court" (Opinion, Appendix A, *infra,* at page 19), and chose instead to rely on dicta in three cases where convictions were in fact set aside, as well as to rely on one non-criminal case, and on *Adderley* v. *Florida,* 385 U.S. 39 (1966). The latter case is clearly distinguishable because the decision rests on a finding of fact that there was interference in circumstances (since it was a jail) where any degree of interference raises delicate and difficult questions of safety and security. For the rest, the Supreme Judicial Court resorted to bootstrap reasoning by hypothesizing potential interference which, in this case, simply has no basis in fact—interference which did not occur here and which was not likely to occur.

Appellant did not interfere with the use of the Building. So far as appears from the Record and from the opinion of the court below, appellant was deprived of his right to speak on the ground that the City of Boston, as owner of the Building, may arbitrarily choose to admit twenty young men into the Building while excluding persons who, like appellant, wish to speak to that audience about vital matters of great public and private concern. Indeed, it is at times like these, when views held and expressed by the appellant may not be popular among certain citizens and governmental officials, that this Court must be especially vigilant in preventing repressive enforcement, and perhaps selective enforcement, of criminal trespass and other such statutes in circumstances where there is little or no evil to be remedied by resort to such laws.

The suggestion that appellant would be free to enter the Building at 9:00 a.m. is specious since appellant's only interest in entering the Building was to speak with pre-inductees. Manifestly, whatever considerations militate in favor of excluding appellant from the Building at 7:00 a.m. apply with equal force to the more numerous pre-inductees. As appellant has consistently maintained, he does not insist on the right to enter the Building at 7:00 a.m., but will be happy to come at whatever time the pre-inductees are instructed to report, whether 7:00 a.m. or 11:00 a.m. or any other time. Indeed, if, after reporting, the pre-inductees were ordered to wait for the bus outside the Building, appellant would have his opportunity to speak to them. But the City's naked "right" to permit the pre-inductees to wait inside the Building while excluding appellant does not remotely resemble the sort of compelling state interest which would justify infringing appellant's right to speak.

This case involves a significant and substantial federal question, for if it is allowed to stand, the thrust and substance of *Adderley* v. *Florida, supra,* will become distorted, and that decision will be ever more frequently abused to silence persons who hold unpopular views. These fundamental First Amendment rights will surely atrophy if at every opportunity the State is free to prevent their exercise by devising some flimsy theory that exercise of such First Amendment rights might theoretically inconvenience the public or some governmental agency or function.

Conclusion.

It is submitted that the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts is in error and that the statute here involved, as applied in these cir-

cumstances, is repugnant to the Constitution of the United States. Appellant respectfully urges this Honorable Court to note probable jurisdiction and set this case down for a plenary hearing on the merits.

Respectfully submitted,

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Attorney for Appellant.

Appendix A.

Massachusetts Advance Sheets (1969), Pages 175-179.

COMMONWEALTH *vs.* NICK M. EGLESON.

Suffolk. January 6, 1969. — January 30, 1969.

Present: WILKINS, C.J., SPALDING, WHITTEMORE, SPIEGEL, & REARDON, JJ.

Trespass. Public Building. Municipal Corporations, Property. *Constitutional Law,* Freedom of speech. *Words,* "Another."

Case heard in the Superior Court without jury by *Canavan,* J., a Municipal Court judge sitting under statutory authority.

WILKINS, C.J. The defendant was convicted of the crime of trespass and fined $20. General Laws (Ter. Ed.) c. 266, § 120, in part provides, "Whoever, without right, enters or remains in or upon the dwelling house, buildings, boats or improved or enclosed land, wharf or pier of another, after having been forbidden so to do by the person who has the lawful control of said premises, either directly or by notice posted thereon, shall be punished by a fine of not more than twenty dollars."

The evidence was uncontradicted. The trespass occurred at a building owned by the city of Boston at 20 South Street in the Jamaica Plain district. The building consists of four brick stories, and contains several facilities: an office of Selective Service System Local Board No. 151, a Civil Defense office, and an entrance to a running track on the fourth floor; a gymnasium with four basketball courts, a dental clinic, and a baby clinic on the third floor; a locker room on the second floor; offices of the Visiting Nurse Association and of the custodian on the first floor; and a swimming pool in the basement. Two staircases lead from the ground floor to the fourth floor. There are numerous bulletins set-

ting forth information of public interest, such as employment opportunities.

One Slowe was the custodian in charge of the building. On the morning of April 2, 1968, at 6:15 A.M. he arrived at the building, and unlocked the doors. Thereafter the front doors were left open. During the next forty-five minutes two women in charge of the Local Board office and about twenty young men reporting to that office entered the building. Pre-inductees normally arrive before 7 A.M. and stand in the lobby of the fourth floor in a space about fifteen by twenty feet until 7:30 A.M. when they go downstairs and leave by bus. The practice was for pre-inductees to check in with the Board, obtain their files, and take them to the Army Base, where they undergo physical examination.

That morning between 6:20 and 6:25 the defendant, an instructor at Massachusetts Institute of Technology who worked with the "Boston Draft Resistance Group," accompanied by three girls, entered the building. Slowe inquired whether the defendant had business in the building, to which the latter replied that he wished to speak to pre-inductees as to their rights in relation to the draft. Slowe requested the defendant to leave the building. The defendant asked whether pre-inductees were allowed to enter. Slowe said that they were allowed to go to the fourth floor. Slowe also said that the defendant was interfering with his cleaning the building and that only cleaning personnel and persons having business with the Draft Board were normally admitted at that hour. The defendant and his companions then went outside the first set of doors and remained in the entrance patio.

About 6:35 the defendant, accompanying a pre-inductee, reëntered. Pursuant to a telephone call by Slowe, police officers arrived about 6:45. The officers and Slowe found

the defendant speaking with a group of pre-inductees on the landing between the third and fourth floors. At that time about twenty pre-inductees were present, most of them on the fourth floor, but some were on the staircase between the third and fourth floors. The officers said if the defendant would leave, they would not arrest him. The defendant stated that he felt that he had the right to stay, and the defendant was arrested.

In talking to pre-inductees, the defendant identified himself and his association with the "Boston Draft Resistance Group," stated his dislike of the Vietnam War, and informed them of their rights. He did not force conversation upon anyone. He did not counsel anyone to commit an illegal act, and did not intend to create a disturbance or interfere with the cleaning. He insisted on entering and remaining in the building because it would have been very difficult, if not impossible, to speak "meaningfully" with pre-inductees outside the building.

1. The defendant asserts, without citation of authority, that G. L. c. 266, § 120, covers only private property and "does not apply to buildings owned by a municipality." But in 1895 there was a decision by this court in which the contrary was assumed without discussion. *Fitzgerald* v. *Lewis,* 164 Mass. 495. That case arose under lineal statutory predecessors of § 120, namely Pub. Sts. c. 203, §§ 99, 100, and St. 1890, c. 410, and upheld police arrests for trespasses upon real estate owned by the city of Springfield. The land was part of the poor farm upon which the almshouse was located. The statute contains no exceptions, and we see no reason to believe that there was any inadvertent oversight in the opinion. We are unimpressed with the defendant's analysis of Pub. Sts. c. 203, § 99, and his failure to give adequate weight to the amendment by St.

1890, c. 410, which expressly covered "buildings."[1] The present statute, so far as material, is in substantially the same language as St. 1890, c. 410, and R. L. c. 208, § 109.

We hold that "another" in c. 266, § 120, includes the State and municipalities. To similar effect are majority opinion in *Adderley* v. *Florida,* 385 U. S. 39; *State* v. *Kirk,* 84 N. J. Super. 151, 156.

2. The defendant challenges the conviction on the ground that he was not in the building "without right," as required in § 120. He bases his case largely upon a claim to exercise a so called First Amendment right. The resolving of such rights depends upon the particular facts of each case. In final analysis, determination depends upon the view which currently prevails in the Supreme Court of the United States, and which is often expressed by a divided court.

In the circumstances, we content ourselves by stating what appear to us should be the determinative factors. The defendant first entered the building in the early morning before it was open to the general public. It was approximately the hour usual for the appearance of pre-inductees to check in with their Local Draft Board. There was a period of one-half hour in which about twenty of them were to receive their files from the Board and depart together in a bus to the Army Base. This was not a propitious time nor place for a self-appointed layman who was a member of a draft resistance group to offer his ideas on constitutional or other "rights" or to volunteer expositions of grounds of opposition to the Vietnam War. If the defendant could

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[1] "An Act relating to trespass upon real estate. Section ninety-nine of chapter two hundred and three of the Public Statutes is hereby amended so as to read as follows: Whoever without right enters upon or remains on or in the dwellinghouse, buildings or improved or enclosed land of another, after being forbidden so to do by the person having the lawful control of said premises, either directly or by notice posted thereon, shall be punished by a fine not exceeding twenty dollars."

properly enter with three girls of undisclosed purpose, then an indefinite number of people, accompanied by individual groups of additional persons, could also enter. If the defendant with similar intent could enter with one pre-inductee, an indefinite number of others could, equally unsolicited, enter with one or more other pre-inductees. The defendant's purpose could, at best, be of no help, and probably would be a deterrent, to the efficient work of the Draft Board. Interviews attempted, while standing on the stairway and in the rug-sized lobby of the fourth floor, could hardly be more "meaningful" than similar discussions outdoors in the April morning air which the defendant refused.

The city had both a right and a duty to protect the building and its functions against any self-proclaimed need for an individual entry which could not, so far as appears, benefit the public use in any respect. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida,* 385 U. S. 39, 47. "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *Cox* v. *Louisiana,* 379 U. S. 536, 554. See *Cox* v. *Louisiana,* 379 U. S. 559, 563; *Cameron* v. *Johnson,* 390 U. S. 611, 616–617; *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.* 391 U. S. 308, 320.

Exceptions overruled.

John G. S. Flym for the defendant.

James M. Kickham, Assistant District Attorney, for the Commonwealth.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1335

NICK N. EGLESON,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

MOTION TO DISMISS

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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MOTION TO DISMISS

Appellees, pursuant to Rule 16(1) (b) of the Rules of this Court, move to dismiss the appeal on the ground that the question presented is so unsubstantial as not to warrant further argument.

Opinion Below

The opinion of the Supreme Judicial Court (Jur. St. App. A) is reported at Massachusetts Advance Sheets (1969) pp. 175-179.

Jurisdiction

The judgment of the Supreme Judicial Court was entered on January 30, 1969. The jurisdictional statement was filed on April 30, 1969. Appellant invokes the jurisdiction of this Court under 28 U.S.C. 1257(2).

Question Presented

Whether petitioner's conviction for trespassing violated his right of free speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Statement

After a non-jury trial, appellant was convicted in the Superior Court of Suffolk County of trespassing in violation of Mass. Gen. Laws (Ter. Ed.) Ch. 266 § 160.[1] He was fined $20. The Supreme Judicial Court affirmed the conviction (Jur. St. App. A).

1. The Commonwealth's evidence is not challenged and is set forth in complete detail in the opinion of the court below. It showed that at approximately 6:15 a.m. on April 2, 1968, one John Slowe, the custodian in charge of a building owned by the City of Boston, unlocked the doors and began his maintenance activities. That building consists of four brick stories, and contains several public facilities including an office of Selective Service System Local Board No. 151. During the next forty-five minutes, two women in charge of the local board office, and about twenty pre-inductees, entered the building. At approximately 6:20 a.m., appellant, an instructor at Massachusetts Institute of

[1] That statute provides in pertinent part: "Whoever, without right, enters or remains in or upon the dwelling house, buildings, boats or improved or enclosed land, wharf or pier of another, after having been forbidden so to do by the person who has lawful control of said premises, either directly or by notice posted thereon, shall be punished by a fine of not more than twenty dollars."

Technology who worked with the "Boston Draft Resistance Group", accompanied by three girls, entered the building. Slowe asked appellant whether he had business in the building, and appellant told him that he wished to speak to the pre-inductees with respect to their rights in relation to the draft. Slowe told appellant that only those having business with the draft board, and cleaning personnel, were normally permitted to enter the building at that hour, and that he (appellant) was interfering with his cleaning operations. At Slowe's request, appellant retreated to the entrance patio outside the first set of doors.

Approximately fifteen minutes later, appellant reentered the building with a pre-inductee. Slowe telephoned police officers who arrived at about 6:45 a.m. They found appellant addressing approximately twenty pre-inductees standing on the fourth floor of the building, and on the staircase between the third and fourth floors. The police officers told appellant that he would not be arrested if he left the building. Appellant refused to leave the building, and was placed under arrest.

2. Appellant testified, *inter alia,* that he did not force conversation upon anyone; that he did not counsel anyone to do anything that would be illegal; and that attempted conversation with the pre-inductees outside of the building would have been, in his opinion, unfruitful.

Argument

In the circumstances, there is no occasion for further review by this Court. Appellant was not convicted of exercising rights of free speech guaranteed by the First and Fourteenth Amendments to the Constitution, but for unprotected conduct — *i.e.,* unauthorized entry into a building at a time when it was closed to the public in general. As such, the conviction was proper. Cf. *Adderly* v. *Florida,*

385 U.S. 39; *Cox* v. *Louisiana*, 379 U.S. 559. *Amalgamated Food Employees Union 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 — upon which appellant chiefly relies — is not to the contrary. In that case, a lower court had enjoined all picketing — whether peaceful or not — in a "public" shopping center. Here no such blanket prohibition exists. Nothing in the statute under which appellant was convicted prevented him from pursuing his chosen activities at a time when the building was open to the public. It simply prevents access when it is normally closed to the public.[2] This reasonably and narrowly drawn statute, which, in the interest of public safety, proscribes a course of conduct — although such conduct might embrace elements of speech — was therefore properly applied to appellant in the circumstances. *Cox* v. *Louisiana*, 379 U.S. 559, 563.

Conclusion

For the reasons stated, it is respectfully submitted that the appeal should be dismissed on the ground that it does not present a substantial federal question.

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[2] No claim was made below, nor is there any showing, that the building was closed to the general public for the sole purpose of preventing the conduct pursued by appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

EGLESON *v.* MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 1335. Decided June 2, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.